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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

AUGUSTA M. TURNER,
Petitioner,

vs.

ALTON BANKING AND TRUST COMPANY, Executor of the Estate of August Luer, Deceased,
Respondent.

No. 232

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

LON HOCKER,
Attorney for Petitioner.

JONES, HOCKER, GLADNEY & GRAND,
CHASE MORSEY,
WILLIAM M. SMITH,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner, Augusta M. Turner, prays that a writ of certiorari issue to review a judgment of the Court of Appeals for the Eighth Circuit affirming a judgment of the District Court of the United States for the Eastern District of Missouri.

SUMMARY STATEMENT.

Respondent brought this suit (R. 1) March 13, 1946, in the United States Court sitting in Missouri upon a judgment rendered in the State Court sitting in Madison County, Illinois, May 21, 1943 (R. 22-23).

A.

The Illinois judgment was procured without the issuance of any process against petitioner and without a smidgen of notice or opportunity for hearing (R. 19) under the Illinois practice relating to so-called cognovit notes, upon an instrument purporting to have been signed by petitioner on February 17, 1930, containing a standard clause authorizing any attorney to confess judgment against her in any court of record (Exhibit A, R. 29).

The United States District Court, and, on appeal, the United States Court of Appeals, held that the Illinois judgment was entitled to full faith and credit under the United States Constitution and that petitioner could not question its validity.

The opinion filed states (R. 61):

> "The judgment of the Illinois Court is final and conclusive in all courts. It cannot be attacked collaterally in the federal court in Missouri. The Full Faith and Credit Clause of the Constitution (Art. IV, Sec. 1) has established 'throughout the federal system the salutary principle of the common law that a litigation once pursued to a judgment shall be as conclusive of the rights of the parties in every other court (federal as well as state) as in that where the judgment was rendered.'"

Petitioner contends that this holding, since it deprives her of the opportunity in all courts to assert any defenses

to the note, takes her property without due process of law and hence is violative of Amendment XIV of the Constitution of the United States.

This contention directly challenges, as against the due process clause, the entire cognovit practice as it exists today in the State of Illinois.

This question has never been passed upon by this court.

B.

In this particular instance, a previous judgment had been rendered in the same court upon the same note, in another action brought by respondent, on February 24, 1943 (R. 33), by confession of her "purported" attorney, one L. G. George (R. 36).

In accordance with the meager generosity of the Illinois practice (Ill. R. S. 1949, Chap. 110, Sec. 259.26), your petitioner, who by chance had heard of the first judgment, employed attorneys of her own choice who filed a motion in the Illinois court to set aside the judgment on March 26, 1943, saying that she had a good and meritorious defense to the whole of the plaintiff's demand (R. 34-35). The court did set aside the judgment and continued the case for trial on the issues raised by her motion on May 20, 1943 (R. 37).

On the very next day, May 21, 1943, and while the first cause was awaiting trial, respondent filed a second suit and employed another attorney, one M. E. Newell, who entered petitioner's appearance in the same court a second time and confessed a second judgment against her, again without process or notice (R. 21). This extraordinary document, signed in her behalf by a lawyer of her enemy's choosing, waives process, confesses the demand, promises neither to appeal nor to resort to equity and consents to immediate execution (R. 19). Laying aside the attorney fiction, respondent waived for petitioner the defenses she was then

asserting in the same court. It is on this second judgment that this suit is brought and it is this judgment which, according to the opinion of the Court of Appeals, is unassailable because it must be accorded full faith and credit under the United States Constitution.

In this connection the Court of Appeals said (R. 62):

> "Due process does not require notice where rights are established in conformity with state law."

Petitioner contends, whether or not due process permits judgment by confession of liability in advance of accrual thereof in any case, that due process was not accorded here, where a judgment was rendered by stealth, when the parties, the attorneys and the court itself knew that an issue had been made and was then pending unresolved on the very matter on which judgment was rendered.

C.

The history of the federal court trial is as follows:

To the petition, founded upon the Illinois judgment (R. 1), petitioner filed her answer (R. 4), containing four defenses. Defenses one and two were based upon want of jurisdiction over her person by the Illinois court. Defenses three and four asserted the existence of defenses to the merits of respondent's original claim on the note. Respondent filed a motion to strike the defenses on the ground that the third and fourth defenses were "available to this defendant only in the original action [and] is not now available collaterally" (R. 9).

The District Court sustained the motion to strike defenses three and four (R. 10), and accordingly the proceedings at the trial consisted almost entirely of the record of the two Illinois cases (R. 12). One of these shows the original petition still pending for trial on the merits, on order of May 20, 1943 (R. 37); the other shows judg-

ment by confession May 21, 1943, for $102,019.15, plus interest and costs, plus, forsooth, $5,000 attorney's fees (R. 22).

A verdict was directed for petitioner (R. 40), but on motion of respondent (R. 41) the verdict was set aside and judgment entered against petitioner for amounts aggregating $141,205.76 (R. 43). This judgment was affirmed by the Court of Appeals (Eighth Circuit) (R. 62).

JURISDICTION.

The judgment of the Court of Appeals was entered May 1, 1950 (R. 62). Petition for rehearing, duly filed (R. 63), was denied on June 19, 1950 (R. 95). The jurisdiction of this court is invoked under Section 1254 (1) of Title 28 of the U. S. Code.

QUESTIONS PRESENTED.

1. Is the Illinois practice of rendering judgments by confession without notice or hearing on so-called cognovit notes invalid as a denial of due process of law under Amendment XIV of U. S. Constitution?

2. If the procedure is held to be valid, then has petitioner been denied due process of law in this case?

3. Has the court below given full faith and credit to an Illinois judgment which has denied petitioner due process of law, and is such full faith and credit required by the U. S. Constitution?

4. Did the court below deny petitioner due process of law by refusing to allow her to make her defense to the note upon which the judgment sued upon was based, where no opportunity to present her defense was given before the original judgment?

5. Is the judgment void because the cognovit is barred on its face by the statute of limitations, and is it therefore not entitled to full faith and credit?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A.

Lawyer's Reasons.

1. The Court of Appeals has decided an important question of Federal constitutional law which has not been, but should be, settled by this court.

2. The Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court.

3. The Court of Appeals has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this court's power of supervision.

4. The Illinois practice providing for judgments on cognovit notes is a denial of due process of law.

5. Under the facts in the case at bar, irrespective of Illinois general practice, petitioner has been denied due process of law.

6. The Illinois court, in entering a judgment against petitioner, has denied her due process of law and the Court of Appeals further denied her due process of law by giving full faith and credit to that judgment.

7. The court below denied petitioner due process of law by refusing to allow her to make her defense.

8. The decision of the Court of Appeals on a Federal question is in conflict with applicable decisions of this court in the following cases:

Griffin v. Griffin, 327 U. S. 220;
New York ex rel. Halvey v. Halvey, 330 U. S. 610;
Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, decided Apr. 24, 1950;

Wuchter v. Pizzutti, 276 U. S. 13;
Baker v. Baker, Eccles & Co., 242 U. S. 394;
Galpin v. Page, 18 Wall. 350.

The decision is also in conflict with the decision of the Court of Appeals of the Fifth Circuit in the case of Drummond v. Lynch, 82 Fed. (2d) 806.

B.

Petitioner's Reasons.

1. Petitioner has had judgment go against her for a very large sum of money—$141,205.76. She was never notified of the Illinois action brought against her; so she had no opportunity to present her defenses to the Illinois Court. When suit was brought in Missouri on the Illinois judgment, and when she tried to present her defenses, she was told that it was too late—she should have presented them in Illinois. She appealed to the United States Court of Appeals, which told her the same thing.

At each step she has invoked the due process clause of Section 1 of Amendment XIV of the Constitution (R. 5, 7, 69, 70) and she is answered with the terrifying statement (R. 62):

> "Due process does not require notice where rights are established in conformity with state law."

She believes that in America and under the United States Constitution some court will somewhere listen to her defense to this note, and that is one reason she relies upon for the allowance of the writ of certiorari to review this judgment.

2. To the dictum of the United States courts that she should have asserted her defenses in the Illinois courts, petitioner has replied by proving that after discovering the first judgment by confession she did exactly that, but

that while the action, in which her defense was asserted, was awaiting trial, the respondent avoided the trial of that issue by covertly taking another judgment by confession against her in the same court, leaving the decoy action still pending. She asserts that such conduct, proved in court, is not entitled to full faith and credit because it deprives her of property without due process of law, and that is another reason relied on for the allowance of the writ.

3. While the amount of property of which she has been deprived is to her very large, she understands that what has happened to her can happen to thousands and tens of thousands of American citizens in the states and territories of Alaska, California, Canal Zone, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Utah, Virginia and Wisconsin, which recognize this practice.

Indeed, she realizes that she herself is not a citizen of one of these states, but is a citizen of the State of Missouri, which does not recognize this procedure and calls it "iniquitous in the uttermost." First National Bank v. White, 220 Mo. 717, 738.

If she can be thus deprived of her day in court, then what citizen of the United States may not find himself confronted with a judgment procured in some state he had never visited on a paper he had never signed? For who would listen to him say he had never visited the state or signed the paper? Not the court where the judgment was rendered, for he was never given an opportunity to know about that action, even if he could afford to travel there to defend it. And not the federal court in his own state, which is asked to help collect it, because full faith and credit must be given to the foreign judgment, which cannot be attacked collaterally! This is the effect of the opinion of the Court of Appeals.

So she feels that the outcome of her application for certiorari is not only important to her, but to every citizen in the land. The Supreme Court has never spoken on the subject. The Court of Appeals opinion has opened wide the doors to fraud and given it impregnable armor. Every person in the United States is now in jeopardy of bankruptcy by the forger and the perjurer.

And that is another reason she relies upon for the allowance of the writ.

CONCLUSION.

It is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

LON HOCKER,
Attorney for Petitioner.

JONES, HOCKER, GLADNEY & GRAND,
CHASE MORSEY,
WILLIAM M. SMITH,
Of Counsel.

BRIEF

In Support of Petition for Writ of Certiorari.

INDEX.

The index appears preceding the petition.

OPINION BELOW.

The opinion of the Court of Appeals (R. 52 to 62) is not yet reported.

JURISDICTION.

The jurisdictional statement appears in the petition for the writ (supra, 5).

SPECIFICATION OF ERRORS.

The assigned errors that petitioner intends to assert are that the trial court erred in setting aside the judgment on the verdict in her favor and in rendering judgment for the respondent in accordance with its motion (R. 43, 44), and that the Court of Appeals erred in affirming the judgment (R. 62) for the reasons relied on for allowance of the writ set out in the petition for the writ (supra, 6-9).

ARGUMENT.

Respondent, and the opinion of which review is sought here, concede that no notice or opportunity to defend was afforded petitioner in the Illinois court. Yet both say petitioner should have made her defense there, and therefore cannot make her defense here, in the only court in which she was afforded any notice (Plaintiff's motion to strike, etc., par. 1, R. 8; par. 4, R. 9; opinion, pp. 60, 61, 62).

This is contrary to the law declared by your Honors in Halvey v. Halvey, 330 U. S. 610, 615, in which the Court held:

> "Whatever may be the authority of a State to undermine a judgment of a sister State on grounds not

> cognizable in the State where the judgment was rendered (cf. Williams v. North Carolina, 325 U. S. 226, 230), it is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."

Furthermore, it simply belies common sense to say that she should have defended where for want of notice she could not defend, and because she did not that she will not be permitted to defend in the only court where she can.

What Respondent and the court really mean is that she waived her constitutional right to due process of law thirteen years before, when she signed that atrocious cognovit note (Ex. A, R. 29).

We question whether any person within the United States contains within his breast enough sovereignty to waive **as to rights not yet accrued** any constitutional guarantee. Could one waive, for example, before a crime was committed, the right of trial by jury? Could one waive future rights of freedom of speech, or to petition Congress, or to remain free of involuntary servitude? These are among the rights with which, according to the Declaration of Independence, man is endowed by his Creator—and they are INALIENABLE.

And even if we assume the possibility of prospective waiver—what we might call indentured civil rights—we are still faced with an insurmountable difficulty in the concept of waiver of due process of law: it is necessary to determine judicially that there really was a waiver, and this involves the resolution of the issues of whether she signed the instrument in the first place, whether there was adequate consideration for the waiver, whether she acted under duress, whether there had been a subsequent accord and satisfaction, whether it was barred by the statute of limitations, and all of the other conceivable issues which might defeat the question of waiver vel non.

As to these issues at least she was entitled to due process of law. **The finding that she has waived due process of law must itself be made by due process of law.**

The finding that she had waived due process of law in the case at bar was made without notice to her—without an opportunity to appear and contest the waiver—upon the ex parte affidavit of an officer of the respondent corporation that he was acquainted with petitioner's signature, and that it appears on the note—that she was a nonresident of Illinois—that her present address is No. 16 Princeton Place, University City, Missouri, that no usury was charged, and that none of the demand had been paid (R. 18).

That is all the trial there was—one interested affidavit—on the question of whether petitioner had waived the inalienable right of due process of law.

Yet her address is set out in this very affidavit. The names of her lawyers are on file in the previous action brought in the same court by the same lawyer for the same plaintiff. The United States mail will carry notice of this new action to either her or her lawyers for three cents in a few hours.

What in the name of justice was the hurry? The note was then thirteen years and three months old.

Of course, it was not the purpose of the respondent to give petitioner any opportunity to be heard on that issue; otherwise it would have tried the previous case to which she had entered her appearance. Instead, respondent stole into court with its petition, had the ex parte hearing on the waiver by filing the affidavit, got a lawyer to effectuate it by confessing judgment, and stole out again with an execution all on the same day, May 21, 1943 (R. 14 to 21).

Only this spring Your Honors had occasion to consider the question of whether newspaper publication was suf-

ficient notice to satisfy due process, in Mullane v. Central Hanover Trust Co., 339 U. S. 306. The court held:

> [317] "Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient . . ."
>
> [318] "As to known beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

If in the Mullane case publication denied due process where addresses were known, what must the court think of the refusal of any notice of any sort in the case at bar?

To designate any attorney of any court of record one's agent to waive service of process puts one in a far more helpless position than to designate one certain public official one's agent for service of process, for in the latter case the victim at least knows whom he must watch. Yet the law is clear that unless there is some provision for mail notification by the certain public official to the principal to be served, the statutory designation is void as a deprivation of due process.

In the case of Wuchter v. Pizzutti, 276 U. S. 13, this court had before it a law of New Jersey providing that a nonresident driver of an automobile on the highways in New Jersey appointed the Secretary of State as his agent to accept service of process in any action brought against

the driver for negligence in the operation of the vehicle on the public highways. In holding that this provision for service was a denial of due process of law, Chief Justice Taft said:

> "The question made in the present case is whether a statute making the Secretary of State the person to receive the process must, in order to be valid, contain a provision making it reasonably probable that notice of the service on the Secretary will be communicated to the nonresident defendant who is sued.
>
> "Where the service of summons is limited to a service on the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any nonresident he chooses, and through service upon the state official, obtain a default judgment against a nonresident who has never been in the state, who had nothing to do with the accident or whose automobile having been in the state never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud or injustice is not a reasonable provision and in the case supposed would clearly be depriving a defendant of his property without due process of law."

It was argued below that the Illinois practice of opening a judgment by confession on motion of the judgment defendant affords due process to a procedure which might otherwise be regarded as invalid. The practice is set forth in R. S. Ill. 1949, Ch. 110, Sec. 259.26, as follows:

> "**Opening of Judgment by Confession.** A motion to open a judgment by confession shall be supported by affidavit in the manner provided by rule 15 for summary judgments, and if the motion and affidavit discloses a prima facie defense on the merits to the

whole or a part of the plaintiff's demand, the court shall set such motion down for hearing. The plaintiff may file counter affidavits. If, at the hearing upon such motion, it shall appear that the defendant has a defense on the merits to the whole or a part of the plaintiff's demand and that he has been diligent in presenting his motion to open such judgment, the court shall then sustain the motion either as to the whole of the judgment or as to such part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial, and the complaint, motion and affidavit, and counter affidavits shall constitute the pleadings unless the parties, or either of them, shall ask leave to file further pleadings. The plaintiff may amend his complaint so as to include any claims which may have accrued subsequent to the entry of the original judgment. The issues of such case shall be tried by the court without a jury unless the defendant or the plaintiff demand a jury and pay the proper fee (where one is required by law) to the clerk at the time of the entry of the order opening the judgment. The original judgment shall stand as security, and all further proceedings thereon shall be stayed until the further order of the court, but where the defense is only to a part of the original judgment, such judgment shall stand as to the balance and execution issue thereon."

This same argument was made to this court in the case of Griffin v. Griffin, 327 U. S. 220. In that case the New York practice permitted the entry of a judgment for accrued alimony in a case in which the defendant was originally served with process and a divorce was granted his wife. The judgment for accrued alimony was entered without any further notice to the defendant. The New York practice gave the defendant the right to move to set aside the judgment upon showing of a proper defense.

In denying that this constituted due process of law, this court, speaking through Mr. Chief Justice Stone, said:

> "To the suggestion that under the presumed New York practice, the power asserted by the judgment does not include the final adjudication of any of the defenses which petitioner might have had, and that notice is therefore not required, the answer must be that the judgment authorizes the immediate issuance of execution. We are unable to reconcile the direction that petitioner's property be seized on execution to satisfy an obligation for the first time found by the judgment to be 'due and unpaid' with the theory that the obligation is, for constitutional purposes, thus only tentatively adjudicated * * *.
>
> "Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment."

Furthermore, in the case at bar petitioner tried the allegedly exonerating procedure and found it a sham and a fraud. She hired lawyers, entered her appearance, submitted to the jurisdiction of the court, and girded her loins for battle. The court set aside the judgment, continued the case for trial, and the next day entered another judgment by confession.

A practice which authorizes such duplicity should be struck down like a poisonous snake.

One final word should be spoken by the lawyer for the petitioner.

This practice stultifies the practice of law. Some attorney of some court of record, to preserve the fiction, must say that he represents the defendant, when he has

actually been selected by the plaintiff, and has had no contact with his supposed client. The astonishing confusion betwixt truth and fiction which the system fosters is illustrated by allegation 9 of respondent's motion for new trial (R. 42):

> "The Court erred in permitting the defendant to testify that she did not engage the attorney who appeared for her on the occasion of the entry of the judgment forming the basis of this proceeding, for the reason that such testimony constituted a conclusion of law concerning the legal effect of the cognovit note, etc."

It obliges the lawyer, while purporting to protect his client's interest, to deliver him hog-tied to the enemy. It makes duplicity of what should be the highest trust. It debases the lawyer, and with him, the law.

According to the law digests of Martindale-Hubbell, this practice is ostracized in thirty-five states and territories. One of them, New Mexico, declares the taking of such instruments a crime. New Mex. R. S. A. 1941, Ch. 19, § 918. One state, Missouri, calls them "iniquitous in the uttermost". Bank v. White, 220 Mo., l. c. 738. The reason the practice is so abhorred is because it violates fundamental principles of fairness embodied in the concept of due process of law.

This court should issue the writ of certiorari to correct the error of the Court of Appeals and declare this practice unconstitutional.

Respectfully submitted,
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